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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY,
Petitioner,

V.

IRVIN YUNGKAU, EXECUTOR OF THE ESTATE OF ALBERT YUNGKAU, DECEASED; H. E. FRANZ, EXECUTOR OF THE ESTATE OF WILLIAM R. GILPIN, DECEASED; LUCY LOGAN MASSIE, EXECUTRIX OF THE ESTATE OF WILLIAM K. MASSIE, DECEASED; BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS OF THE ESTATE OF BEN WILLIAMSON, DECEASED; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS OF THE ESTATE OF JAMES H. KITCHEN, DECEASED; CATHERINE C. KITCHEN, EXECUTRIX OF THE ESTATE OF JOHN W. KITCHEN, DECEASED; HENRY SANDIFER, EXECUTOR OF THE ESTATE OF ALEXANDER B. MASSEY, DECEASED,
Respondents.

BRIEF OF RESPONDENTS, BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS, ETC.; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS, ETC.; AND CATHERINE C. KITCHEN, EXECUTRIX, ETC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LeWRIGHT BROWNING
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STANDARD PTG. & PUB. CO., LAW PRINTERS, HUNTINGTON, W. VA.

INDEX TO BRIEF

I

	Pages
The opinion of the Court below	1

II

Statement of the Questions Involved	2

III

Argument	2-5

TABLE OF CASES

50 Am. Jur. p. 51, Sec. 30	3
Anderson v. Yungkau, 153 Fed. (2) 685 (Adv. Sheets)	1
Anderson v. Brady, 1 F. R. D. 589	2, 4
Burke v. Canfield (App.D.C.) 111 Fed. (2) 526	4
Escoe v. Zerbst, 295 U.S. 490, 79 L. Ed. 1566	3
Guaranty Trust Co. v. York, 326 U.S. 99, 89 L. Ed. 2079	4
Exparte Jordan, 94 U.S. 248, 24 L. Ed. 123	3
Michigan Ins. Bank v. Eldred, 130 U.S. 693, 32 L. Ed. 1080	4
Mutual Ben. Health & Accident Assn. v. Snyder, (C.C.A.6) 109 Fed. (2) 469	4
Murray v. Edes Mfg. Co. 305 Mass. 311, 25 N.E. (2) 746	3
Securities & Exchange Com. v. C. M. Joiner Leasing Corp. 320 U.S. 344, 88 L. Ed. 88	3
State v. Wendling Bros Co. 127 Ohio St. 336, 184 N.E. 566	3
United States v. Sherwood, 312 U.S. 584, 85 L. Ed. 1058	4
United States v. Thoman, 156 U.S. 353, 39 L. Ed. 450	3
Wallace v. United States (C.C.A.2) 143 Fed. (2) 240	3,4
Winkelman v. Gen. Motors Corp. 30 F. Supp. 112	4
West Wisconsin Ry. Co. v. Foley, 94 U.S. 100, 24 L. Ed. 71	3

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BRIEF OF RESPONDENTS, BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS, ETC.; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS, ETC.; AND CATHERINE C. KITCHEN, EXECUTRIX, ETC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals for the Sixth Circuit delivered herein is reported in *153 Fed. (2) 685* (Advance Sheets). No opinion was delivered by the

District Court, the ruling being based upon the opinion of that court reported in *1 F. R. D. 589.*

THE QUESTION INVOLVED

The question involved herein is whether or not a power to extend the right of revivor beyond the two year period of limitation prescribed by *Rule 25* and *Section 778, 28 U.S.C.A.*, may be imported into the rule and statute via the provisions of *Rule 6 (b)*.

ARGUMENT

Rule 25 (a) has the same effect as a statute of limitation with respect to the revival of an action against the estate of a decedent, and by its terms a binding duty rests upon the court to dismiss the action if revivor is not had within the two year period.

The mandatory language of *Rule 25 (a)* is not nullified by *Rule 6 (b)*. The latter rule is designed to afford relief to a *party* whose failure to take timely required steps might be properly classified as "excusable neglect," but it does not apply to affirmative action required of the court by the plain language of *Rule 25 (a)*.

The limitation prescribed by *Rule 25 (a)* is the same as the statutory period prescribed in *Sec. 778, 28 U.S.C.A.*, and the words of limitation found in the rule must have been used advisedly; consequently the general language of *Rule 6 (b)* must yield to the specific requirement of *Rule 25 (a)*.

Rule 6 (b) refers to acts or steps permitted or required to be done by the *parties*. It has no reference to actions required to be taken by the *court* where such action is provided for by another rule.

The requirement of *Rule 25 (a)* that "the action *shall* be dismissed" in the event of failure to revive within the two year period of limitation is mandatory. When *Rule 25 (a)* was promulgated, the period of limitation therein prescribed was a right existing under the provisions of *Sec. 778, 28 U.S.C.A.*, and consequently "shall" as used in the rule is to be construed as "must." *West Wisconsin Ry. Co. v. Foley, 94 U. S. 100, 24 L. Ed. 71; Ex Parte Jordan, 94 U.S. 248, 24 L. Ed. 123; Escoe v. Zerbst, 295 U.S. 490, 79 L. Ed. 1566.* The word "shall" in a statute is normally "the language of command," and where, as in *Rule 25 (a)*, there is the use of both "may" and "shall" in the same paragraph, the necessary implication is that each word is used in its ordinary sense and not in the ordinary sense of the other. *United States v. Thoman, 156 U.S. 353, 39 L. Ed. 450; State v. Wendling Bros Co. 127 Ohio St. 336, 184 N.E. 566; Murray v. Edes Mfg. Co. 305 Mass. 311, 25 N.E. (2) 746; 50 Am. Jur. p. 51, Sec. 30; 25 R. C. L., p. 767, Sec. 15.*

The explicit exception from the scope of *Rule 6 (b)*, of *Rule 59* and the period for taking an appeal, does not operate to make the provisions of *Rule 6 (b)* applicable to *Rule 25 (a)*; the interpretative device embodied in "expressio unius exclusio alterius" must yield to the emphatic language of *Rule 25 (a). Securities & Exchange Commission v. C. M. Joiner Leasing Corp. 320 U.S. 344, 350, 88 L. Ed. 88; Wallace v. United States (C.C.A.2) 142 Fed. (2) 240.*

The recommendation of the Advisory Committee on Rules for Civil Procedure as contained in the Second Preliminary Draft, that *Rule 6 (b)* be amended so as to expressly exclude *Rule 25* from its scope, can not be construed as a recognition that *Rule 6 (b)* in its present form is applicable to *Rule 25*. Rather, the purpose of the proposed amendment is to make certain that *Rule 25* shall be

construed as it was construed in this proceeding (see p. 3, Report). The following language of the report is significant (p. 6):

> "As to Rule 25 on substitution, while finality is not involved, the limit there fixed should be absolute, as it always has been by statute."

It may be remarked that if the foregoing recommendation is approved, then the question herein presented would be only of academic interest.

The decision of the Circuit Court of Appeals is in accord with the prior ruling of the District Court in *Anderson v. Brady, 1 F. R. D. 589*, and with the ruling of Judge Mandelbaum in *Winkelman v. General Motors Corp. 30 F. Supp. 112.* It is also in accord with the construction of *Rule 6 (b)* as applicable to *Rule 60 (b)* in *Wallace v. United States (C.C.A.2) 142 Fed. (2) 240*, (cer. den. *323 U. S. 712, 89 L. Ed. 573)* and with the construction of *Rule 6 (b)* as applicable to *Rule 73 (g)* in *Burke v. Canfield (App. D.C.) 111 Fed. (2) 526*, and in *Mutual Benefit Health & Accident Assn. v. Snyder (C.C.A.6) 109 Fed. (2) 469.*

Sec. 778, 28 U.S.C.A. prescribes both a limitation of action and a limitation on the jurisdiction of the courts. Neither could be affected or altered by the Rules of Civil Procedure. That this is so is obvious from the plain language of *Section 723 (b), 28 U.S.C.A.*, which is the authority for the Federal Rules. *United States v. Sherwood, 312 U.S. 584, 85 L. Ed. 1058.* Limitation is a substantive right. *Michigan Insurance Bank v. Eldred, 130 U.S. 693, 32 L. Ed. 1080; Guaranty Trust Co. v. York, 326 U.S. 99, 89 L. Ed. 2079.* Consequently, the period of limitation for revivor prescribed in *Sec. 778* may not be enlarged on restricted by the Rules of Civil Procedure.

It is respectfully submitted that the petition for certiorari should be denied.

LeWRIGHT BROWNING
Counsel for Respondents, Ben Williamson, Jr., and Davis Geiger, Co-Ex'rs., etc., Watt M. Prichard and Charles V. Kitchen, Co-Ex'rs., etc., and Catherine C. Kitchen, Ex'x, Etc.

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IRVIN YUNGKAU, ET AL, - - - - *Defendants.*

H. R. DYSARD,
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SUBJECT INDEX

The opinions below and which are appealed from are found in 153 Fed. (2nd) 685.

No written opinion was filed by the District Judge, who decided this case, but he relied on Anderson v. Brady, 1 F. R. D. 589.

JURISDICTION

Jurisdiction is conceded.

QUESTION INVOLVED

The question to be decided is whether Rule 25 means what it says. We think it should be held that it does. To hold otherwise would open up every estate in the United States. No justification is given herein for such sweeping relief.

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IRVIN YUNGKAU, ET AL, - - - *Defendants.*

MAY IT PLEASE THE COURT:

ARGUMENT

Responding to the petitioner's brief herein, we desire to say Albert Yungkau was engaged in the wholesale meat business in Ashland, Kentucky, for many years before he died. He died on July 19, 1941. Notice of his death and his picture were carried in all the papers in the country, including the Cincinnati Enquirer, the Ashland Daily Independent, and notice of his death was carried in the Courier-Journal, Huntington Herald - Dispatch, and probably other papers. The facts are stipulated on pages 5 and 6 of the transcript of the record, showing his death, the probating of his will on July 28, 1941, and his estate immediately being delivered to the beneficiaries under his will. Now,

three years after his death, a motion is made to revive this action against his executor.

In petitioner's brief counsel lays stress on the fact that people moved about because of the war. We have already responded to that insofar as Albert Yungkau is concerned. While we do not represent Ben Williamson, the argument does not apply to him because he was a United States Senator from Kentucky at one time and engaged in the wholesale hardware business in Ashland, Kentucky, for probably fifty (50) years, and it would not apply to James H. Kitchen or John W. Kitchen because one was President and the other Vice-President of the Second National Bank of Ashland, Ashland, Kentucky, and their deaths were in all the publications circulating in Louisville, Ci. cinnati, and Ashland. The change of residence because of the war had nothing to do with any of these men. It is inconceivable that some of these attorneys or employees of this Receiver, or the Receiver himself didn't see and know about the deaths of these prominent men, but whether they knew it or not, we do not think that the fact they didn't know it would justify this court in upsetting a limitation fixed by the Federal Courts to revive these actions where the defendant dies. About the only excuse that petitioners have is that they were busy and didn't know about the deaths of these prominent men, when a postal card to any lawyer in Ashland or any business man in Ashland would have informed them of the death of these prominent men. Having neglected to keep track of these parties that they had sued, they now come in and upon the ground that they should be excused for their negligence, they come into this court and ask this court to change the law of this country on the period of time they have to revive or

substitute the administrator or the executor to do the thing that should have been done within two (2) years. One of the charges so often leveled at the courts today is that they decide what the law makers should have done and not what they did do. In other words, the charge is that the inclination of the court is to legislate instead of interpret.

In the case against Yungkau the facts are that the beneficiaries received the assets and thought this case was closed three (3) years before this motion, and if two (2) years can be enlarged to three (3) years why can it not be enlarged to any other length of time with the result that you could never know when an estate was settled. We do not understand that these stipulations excuse this Receiver and his attorneys from at least every two (2) years checking up. It is not far from Ashland to Louisville, and not far from Ashland to Cincinnati, and the death of every one of these men was reported in the Cincinnati and Louisville papers, together with their pictures — at least three of them, Ben Williamson, J. H. Kitchen, and J. W. Kitchen, in the banking journals.

For the defendant, William R. Gilpin, a stronger case in point of elapsed time is presented. As shown on page 7 of the transcript of the record, William R. Gilpin died on January 23, 1937, so that almost five years passed by before World War II ensued. Almost eight years after his death, the petitioner sought to revive this action against the Gilpin Estate. The actual fact is that no effort was ever made to investigate the status of the various defendants and the petitioner has exercised no actual diligence. It would have been a simple matter before the expiration of two years, after

February 18, 1936, when this action was filed, to ascertain from the court records in Boyd County, Kentucky, the death of the Defendant Gilpin. We submit that anything short of an investigation of the status of the various defendants is not equivalent to diligence in the performance of duty. The petitioner now seeks to excuse his lack of diligence by the number of defendants involved and by incidence of World War II. Rule 25A clearly defines the duty of the petitioner, and there is actually no ambiguity in its terms. It concerns the exact situation involved in this case, and is so emphatic as to preclude any exceptions.

We feel that this judgment was proper and should be sustained.

H. R. DYSARD,
and
DYSARD & DYSARD,
Counsel for Albert Yungkau.

R. D. DAVIS,
Counsel for H. E. Franz.